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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE LAMONT TAYLOR,

Defendant and Appellant.

D074449

(Super. Ct. No. FWV1503696)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Bridgid M. McCann, Judge. Reversed in part, remanded with directions.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Seth M. Friedman and Michael P.
Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found Andre Lamont Taylor guilty of first degree murder (Pen. Code, § 187, subd. (a))¹ (count 1) and possession of a firearm as a felon (§ 29800, subd. (a)(1)) (count 2). The jury also found that Taylor personally and intentionally discharged a firearm in committing the murder. (§ 12022.53, subd. (d)). After the jury rendered its verdicts, in a bifurcated proceeding, the trial court found true two serious felony allegations pursuant to the 'Three Strikes' law (§ 1170.12) (strike priors) and two serious felony enhancement allegations (§ 667, subd. (a)(1)) based on the same two prior convictions.

The trial court sentenced Taylor to an aggregate term of 106 years to life in prison, comprised as follows. On count 1, the trial court sentenced Taylor to an indeterminate term of 100 years to life, consisting of 25 years to life for the murder, tripled for the two strike priors, and a consecutive 25 years to life term for the firearm-use enhancement. The court also imposed a single five-year term for one of the two serious felony enhancements on count 1, which the court ordered to be served concurrently with the sentence on count 1. With respect to count 2, the court sentenced Taylor to the upper term of three years, doubled, for a total of six years, to be served consecutively to the sentence on count 1.

On appeal, Taylor claims that there is not substantial evidence of premeditation and deliberation in the record to support the jury's verdict finding him guilty of first degree murder; that the information did not properly allege that he had suffered two strike priors;

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

and that there is not substantial evidence to support the trial court's true findings on the prior conviction allegations. We conclude that there is sufficient evidence in the record of premeditation and deliberation to support the jury's first degree murder verdict and that Taylor forfeited his claim that the information did not properly allege that he had suffered two strike priors. However, we conclude that there is not substantial evidence in the record to support the trial court's true findings that Taylor's prior convictions constituted serious felonies.

Accordingly, we reverse the judgment for the limited purpose of retrying the prior serious felony conviction allegations if the People so elect, resentencing Taylor, and preparing a new abstract of judgment.²

II.

FACTUAL AND PROCEDURAL BACKGROUND

Taylor was a member of a motorcycle club called Rare Breed. His girlfriend, Monquet Simpson, was the former president of Rare Breed's "sister" motorcycle club, Heels on Wheels (Heels). Within a few months of the murder, Simpson had been accused of mismanaging Heels's money. Approximately a week or two before the murder, Simpson was removed from the club because of the allegations. As a result of this conflict, Simpson was angry at Michelle Smallwood, Heels's business manager at the time.

² After the conclusion of any retrial of the serious felony conviction allegations, the trial court will have to resentence Taylor. In part III.D and part III.E, *post*, we address various issues raised by the parties, for purposes of resentencing. In part III.F, *post*, we direct the trial court to ensure that the new abstract of judgment prepared upon the completion of resentencing does not contain two errors that Taylor identifies in this appeal.

On the night of the murder, numerous members of Rare Breeds were at their clubhouse attending a memorial service for a member who had recently died. Several Heels members were also in attendance.

Trina Shamburger, a Heels member, became concerned that Simpson planned to assault Smallwood. Consequently, when Smallwood decided to go home, Shamburger arranged to have several Rare Breed members escort Smallwood and her companion, fellow Heels member Carla Lindo, to Smallwood's car. Among the three escorts was victim, Kevin Hall.

As Smallwood and Lindo walked through the clubhouse parking lot with their three escorts, Simpson approached Smallwood and challenged her to a fight. A fist fight between the two ensued. Hall and the other escorts were able to quickly break up the fight.

As discussed in detail in part III.A, *post*, Taylor became extremely angry with Hall for his actions in attempting to defuse the confrontation between Simpson and Smallwood. After the fist fight ended, Taylor, Simpson, and Simpson's sister walked to Simpson's car. Simpson and her sister got into the car. Taylor paced near the cars and, according to Lindo, "kept ranting."

Shortly thereafter, Hall walked past Simpson's car on his way back to the clubhouse. Taylor stepped out from between the cars and said to Hall, " 'I told you, leave my mother fucking girl's name out your mouth.' " Immediately thereafter, Taylor pulled out a gun and shot Hall repeatedly, killing him.

III.

DISCUSSION

A. *There is substantial evidence of premeditation and deliberation in the record to support the jury's verdict finding Taylor guilty of first degree murder*

Taylor claims that there is not substantial evidence of premeditation and deliberation in the record to support the jury's verdict finding him guilty of first degree murder.

1. *Standard of review*

In determining the sufficiency of the evidence to support a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

2. *Governing law*

Section 189 provides in relevant part:

"All murder that is perpetrated by . . . any . . . kind of willful, deliberate, and premeditated killing . . . is murder of the first degree."

" '[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.] The process of premeditation

and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly' " (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), the Supreme Court identified three categories of evidence that are relevant in proving premeditation and deliberation: planning activity, motive, and the manner of killing. " 'However, . . . " *Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse." ' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.)

3. *Relevant evidence*

There is evidence in the record from which the jury could have found the following. Taylor was infuriated by Hall's actions in connection with the dispute between Simpson and Smallwood. Specifically, the jury could have inferred that Taylor was angry that Hall: (1) attempted to prevent the fight by escorting Smallwood to her car; (2) told Taylor and Simpson on several occasions that the fight was not going to happen and that they should leave; and (3) assisted in ending the fight. In addition, the jury could also have reasonably inferred that Taylor perceived that Hall had sided with Smallwood, rather than with Simpson and Taylor, with respect to the dispute.

At the time the fight ended, the four people, including Hall, who had escorted Smallwood to her car just prior to the fight, remained in the immediate vicinity. Despite his anger, Taylor did not take any immediate action against Hall while in the presence of this group.

Instead, after the fight stopped, Taylor retreated, together with Simpson and her sister, a short distance away from where the fight had taken place. Simpson and her sister got into Simpson's car. Taylor remained near the car and, according to Shamburger, began "[p]acing." At around this time, Smallwood heard Taylor twice yell, "Why are you protecting those bitches[?]" After Taylor observed that several people were standing in a location away from where he was located, he said, "[W]hy you guys down there with those bitches, you all should be up here with me and my girl."

Meanwhile, Hall helped Smallwood find her glasses near the area where the fight had occurred. After Smallwood located her glasses, Hall began to walk back to the clubhouse.

As Hall walked past Simpson's car, Taylor emerged from between the cars and said to him, " 'I told you, leave my mother fucking girl's name out your mouth.' " Taylor then pulled out a gun and started shooting Hall. Taylor continued to shoot Hall even after the victim attempted to run away. The jury could also reasonably have found that Taylor shot Hall twice while he was on the ground, after having been shot. Taylor fired a total of at least fifteen gunshots at Hall, eight of which struck him and caused his death. After shooting Hall, Taylor got into Simpson's car, and she drove the group away from the scene.

4. *Application*

From this evidence, the jury could have reasonably found that Taylor's "[p]acing" back and forth after becoming enraged at Hall during the fight, supported a finding that Taylor engaged in reflective action before committing the shooting. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 577 ["evidence at trial revealed that defendant and the victim were engaged in a verbal altercation; several minutes thereafter elapsed, at which point defendant approached the victim, pulled a firearm from his waistband, cocked the weapon, and fired several shots to the victim's head, neck, and chest areas—conduct that, viewed as a whole, supported the jury's findings of premeditation and deliberation"]; *People v. Perez* (1992) 2 Cal.4th 1117, 1129 [evidence that the defendant had "time to reflect" upon his actions supported finding that defendant committed a premeditated and deliberate murder].) While it does not appear that an *extended* amount of time passed between the confrontation between Simpson and Smallwood and the shooting, "reflection may be arrived at quickly; it need not span a specific or extended period of time." (*People v. Lopez* (2018) 5 Cal.5th 339, 354–355 [discussing premeditation and deliberation under California law]; see *People v. Poindexter* (2006) 144 Cal.App.4th 572, 588 (*Poindexter*) [concluding that evidence was sufficient to support finding of premeditation and deliberation despite the fact that "very little time elapsed" between verbal altercation and shooting].)

The manner of the killing (see *Anderson, supra*, 70 Cal.2d at p. 27) also supports the jury's verdict. The jury could have reasonably inferred that Taylor decided to kill Hall during, or immediately after, the fight between Simpson and Smallwood, but that he

waited to do so until an opportune moment arose. Specifically, the jury could have reasonably inferred that Taylor elected not to shoot Hall until after Simpson and her sister were in the getaway car and Hall was away from the immediate vicinity of several other people who could have potentially come to his assistance. This evidence supports a finding that Taylor killed Hall "according to a 'preconceived design' to take his victim's life." (*Id.* at p. 27.)

Finally, the jury could have found that Taylor shot Hall multiple times from close range without provocation or struggle, and that Taylor continued to shoot at Hall even after he attempted to run away and while he was on the ground, both of which support a finding of premeditation and deliberation. (See *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295 ["The manner of killing—a close-range shooting without any provocation or evidence of a struggle— . . . supports an inference of premeditation and deliberation"]; *People v. Duenas* (2012) 55 Cal.4th 1, 21 [concluding evidence was admissible because it supported inference that "defendant continued to shoot after [victim] was lying on the ground, suggesting premeditation and deliberation"].)

In sum, while the evidence of premeditation and deliberation is not overwhelming, there is substantial evidence in the record from which the jury could have found that Taylor acted with premeditation and deliberation, thus supporting its verdict of first degree murder.

B. *Taylor forfeited his contention that the information failed to properly allege two strike priors*

Taylor claims that the information did not properly allege that he had suffered two strike priors. Specifically, he argues that the information "was not clear that it was alleging [Taylor] had been convicted of two assaults during one prior prosecution." After noting that the case numbers of two prior convictions referred to in the information differed by only a single digit, he argues that the People alleged a *single* prior strike "under two almost identical case numbers."

1. *Factual and procedural background*

a. *The information*

The first page of the information summarizes the offenses and allegations. With respect to count 1, under the heading "Special Allegation," the information states, "PC1170.12(a)-(d)" *twice*, and "PC667(a)(1)" once. With respect to count 2, under the heading "Special Allegation," the information also states, "PC1170.12(a)-(d)" *twice*.

The third page of the information contains the prior conviction allegations. With respect to the strike priors, the information states, "It is further alleged pursuant to Penal Code sections 1170.12(a) through (d) and 667(b) through (i) as to counts 1, 2 that said defendants(s) Andre Lamont Taylor, has suffered the following prior conviction of a serious or violent felony or juvenile adjudication:

"Court Case	Code/Statute	Conv Date	County	State	Court Type
"FSB063093	PC 245(a)(1)	05/31/1995	San Bernardino	CA	Superior"

Immediately following this allegation, the information states, "It is further alleged pursuant to Penal Code sections 1170.12(a) through (d) and 667(b) through (i) as to count(s) 1, 2 that said defendants(s) Andre Lamont Taylor has suffered the following prior conviction of a serious or violent felony or juvenile adjudication:

"Court Case	Code/Statute	Conv Date	County	State	Court Type
"FSB06393	PC 245(a)(1)	05/31/1995	San Bernardino	CA	Superior"

The only difference between the two allegations is that an extra zero appears in the case number of the first strike prior allegation.

Following these strike allegations, the information contains two serious felony allegations (§ 667, subd. (a)(1)). The information states, "It is further alleged as to count(s) 1 pursuant to Penal Code section 667(a)(1) that the defendant(s) Andre Lamont Taylor, has suffered the prior conviction(s) of a serious felony:

"Court Case	Code/Statute	Conv Date	County	State	Court Type
"FSB063093	PC 245(a)(1)	05/31/1995	San Bernardino	CA	Superior
"FSB06393	PC 245(a)(1)	05/31/1995	San Bernardino	CA	Superior"

b. *Relevant proceedings*

During a pretrial hearing, the trial court stated, "So now the last issue for the Court is we do have an 1170.12 allegation. What are we doing with that? Are we trying that to the jury as well?" Defense counsel responded in the negative. Shortly thereafter, the court asked Taylor, "Do you wish to waive your right to have that [*sic*] jury decide that, and have the Court make that determination?"

Taylor responded, "Have the Court make that determination."

After defense counsel joined in the jury waiver, the court stated, "At this point then we will bifurcate out the 1170.12. *Both counts. Since they are from the same case.*" (Italics added.) Taylor did not raise any objection on the ground that the information alleged only one strike prior.

After the jury returned its verdicts, the trial court held a court trial on the prior conviction allegations. The People presented evidence pertaining to two convictions for violations of section 245, subdivision (a)(1)³ arising from a single case, case No. FSB06393. The prosecutor argued that Taylor "suffered the prior convictions as alleged, both of them, of [*sic*] strike convictions in the Information."

Defense counsel stated, "I want to say the convictions in the [section] 969(b)⁴ packet would be sufficiently vague for the Court to base a determination on his determinate term sentence under the verdict of the jury could be doubled by the Court."⁵

³ We review this evidence in detail in part III.C, *post*, in connection with Taylor's claim that the People failed to present sufficient evidence to prove the prior conviction allegations.

⁴ Counsel was referring to § 969b, which provides in relevant part:
"For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this State has been convicted of an act punishable by imprisonment in a state prison, . . . the records or copies of records of any state penitentiary, . . . when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence."

⁵ Such a sentence would correspond to a true finding on one, rather than two, prior serious felony convictions under the Three Strikes law. (Compare § 1170.12, subd. (c)(1) ["If a defendant has *one* prior serious and/or violent felony conviction . . . the determinate term or minimum term for an indeterminate term shall be *twice* the term otherwise

Thereafter, the court stated, "At this point, the Court has two 1170.12 allegations that were alleged. They are both alleged to be the same offense." The court found "both of the [section] 1170.12 (a) through (d) allegations," to be true. Again, Taylor did not raise any objection that only one strike prior had been alleged in the information.

At sentencing, defense counsel requested that the court impose a sentence based on a single strike prior given the "vagueness in the papers that the Court already reviewed."⁶

The court proceeded to review a portion of the evidence presented by the People to prove the strike priors and indicated that the People had proved that there "were two bargained for convictions of [section] 245[, subdivision](a)[(1)]." The court imposed a sentence premised on its finding that the "two [section] 1170.12 allegations . . . have been proven."

2. Applicable governing law

Section 1170.1, subdivision (e) provides, "All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

provided as punishment for the current felony conviction" (italics added)] with § 1170.12 (c)(2)(A)(i) [specifying sentences where "defendant has *two* or more prior serious and/or violent felony convictions" as including "*three* times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious and/or violent felony convictions" (italics added)].)

⁶ It appears that defense counsel was referring to the vagueness of the *evidence* that the People presented to prove the strike priors, rather than vagueness of the *information*. That is because defense counsel used similar terminology at the trial of the priors, and it was clear that counsel at that time was referring to the *evidence* pertaining to the prior convictions. We consider Taylor's claim that there is insufficient evidence in the record to support the court's true findings on the strike allegations in part III.C, *post*.

"[A] defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*People v. Mancebo* (2002) 27 Cal.4th 735, 747 (*Mancebo*).) However, a defendant forfeits a claim that a charging document does not comply with statutory pleading and proof requirements for such allegations where he has notice that the People intend to seek an enhanced sentence and he fails to raise an objection. (*People v. Houston* (2012) 54 Cal.4th 1186, 1229 (*Houston*).) In *Houston*, an indictment charged a defendant with 10 attempted murders, but "did not allege that the attempted murders were deliberate and premeditated," as required in order for the trial court to impose a life sentence pursuant to section 664.⁷ (*Id.* at p. 1226.) Notwithstanding that it was "uncontested that the indictment failed to comply with the requirements of section 664," (*ibid.*) the Supreme Court found that the defendant had forfeited the contention that "he was not provided adequate notice of the punishment he faced." (*Ibid.*) The *Houston* court reasoned:

⁷ Section 664 provides, "The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact."

"During the defense's presentation of its case, the trial court expressly noted that defendant, if convicted, would be sentenced to life imprisonment, and the court asked the parties to say if there was a problem with the proposed jury instructions and verdict forms. One week later, the court said the attempted murder verdict form would include deliberate and premeditated attempted murder as a special finding. At the close of evidence, the trial court instructed the jury to determine whether the attempted murders were willful, deliberate, and premeditated, and indicated that a special finding on this question appeared on the verdict form. . . . On the facts here, defendant received adequate notice of the sentence he faced, and the jury made an express finding that the attempted murders were willful, deliberate, and premeditated. A timely objection to the adequacy of the indictment would have provided an opportunity to craft an appropriate remedy. Because defendant had notice of the sentence he faced and did not raise an objection in the trial court, he has forfeited this claim on appeal." (*Id.* at pp. 1227–1228.)

3. *Application*

Taylor claims that the information alleged only a single strike prior. He reasons, "It is clear that the prosecution could not determine the correct case number for the alleged assault, and therefore chose to list both alternative numbers." We are unpersuaded.

To begin with, we reject Taylor's argument that it is "clear" from the information that the People were alleging only a single strike prior. The first page of the information lists *two* strike priors for both counts one and two. (See pt. III.B.1.a, *ante.*) Further, the third page of the information also describes *two* strike priors. (*Ibid.*) Moreover, there is no language contained in the information suggesting that the People were listing the *same* conviction *twice* due to a lack of certainty as to the proper case number.

Even assuming that the information could be said to be ambiguous, Taylor forfeited any claim as to lack of notice by failing to object in the trial court. The record of the proceedings in the trial court makes clear that Taylor was on notice throughout the trial that the People were seeking to prove *two* strike priors, the trial court found that he in fact suffered *two* strike priors,⁸ and the court sentenced Taylor in accordance with these findings. (See pt. III.B.1.a, *ante*.) Yet Taylor failed to raise any objection that the information alleged only a single strike prior at any time in the trial court. (*Ibid.*) Thus, as in *Houston*, "[b]ecause defendant had notice of the sentence he faced and did not raise an objection in the trial court, he has forfeited this claim on appeal." (*Houston, supra*, 54 Cal.4th at pp. 1227–1228.)

Neither *Mancebo, supra*, 27 Cal.4th 735, nor *People v. Nguyen* (2017) 18 Cal.App.5th 260 (*Nguyen*), on which Taylor relies, supports a different result. In *Mancebo* and *Nguyen*, trial courts imposed unauthorized sentences⁹ unmoored to findings required by law. In *Mancebo*, the court imposed a One Strike law (§ 667.61) sentence based on an unproven multiple victim circumstance (§ 667.61, subd. (e)(5)), which the trial court relied upon "for the first time at sentencing." (*Mancebo, supra*, 27 Cal.4th at p. 751.) In *Nguyen*,

⁸ The record unambiguously demonstrates that Taylor suffered two prior convictions for the same offense in a single case. (See part III.C, *post*.) In part III.C, *post*, we consider whether there is substantial evidence that these two prior convictions constituted serious felony convictions under California law.

⁹ "A sentence is said to be unauthorized if it cannot 'lawfully be imposed under any circumstance in the particular case' [citation], and therefore is reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.'" (*In re Sheena K.* (2007) 40 Cal.4th 875, 887.)

the trial court imposed a five-year serious felony enhancement (§ 667, subd. (a)(1)), notwithstanding that the court never found such an enhancement to be true and the defendant never admitted the enhancement. (*Nguyen, supra*, 18 Cal.App.5th at pp. 262, 265.) Unlike in *Mancebo* and *Nguyen*, the record in this case clearly and unambiguously demonstrates that the trial court found that Taylor suffered two strike priors. (See pt. III.B.1.a, *ante*.) Thus, the sentence was not unauthorized.

Accordingly, we conclude that Taylor forfeited his contention that the information failed to properly allege two strike priors.

C. *There is not substantial evidence in the record to support the trial court's true findings on the strike and serious felony enhancement allegations*

Taylor claims that there is not substantial evidence in the record to support the trial court's true findings that he committed two prior serious felony offenses based on two convictions for violations of former section 245, subdivision (a)(1).¹⁰ Specifically, Taylor

¹⁰ Taylor's opening brief specifically challenged only the sufficiency of the evidence to prove that his prior convictions were serious felonies for purposes of sentencing under the Three Strikes law (§§ 667, subds. (b)–(j), 1170.12), notwithstanding that an identical analysis applies with respect to whether such convictions were serious felonies for purposes of the five-year serious felony enhancement statute (§ 667, subd. (a)). While this appeal was pending, we asked respondent to address the following question:

"If this court were to conclude that the evidence is insufficient to establish Taylor's prior convictions as serious felonies for purposes of the Three Strikes law (Pen. Code, §§ 1170.12, subds. (a)–(d), 667, subd. (b)–(i)), is such evidence similarly insufficient to establish that the same prior convictions are serious felonies for purposes of the five-year serious felony enhancement statute (Pen. Code, § 667, subd. (a))?"

In response to our question, respondent acknowledged that "if this court were to conclude that there was insufficient evidence to establish that [Taylor's] prior . . .

notes that former section 245, subdivision (a)(1) could be violated either by committing an assault with a deadly weapon *or* assault by means of force likely to produce great bodily injury, that the offense qualifies as a serious felony *only* when the conviction was for assault with a deadly weapon, and that there is not substantial evidence that his convictions under former section 245, subdivision (a)(1) were for assault with a deadly weapon.

1. *Standard of review*

"On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*People v. Miles* (2008) 43 Cal.4th 1074, 1083 (*Miles*).)

2. *Governing law*

a. *A serious felony under California law*

A defendant who has suffered a "serious felony" conviction may be subject to an enhanced sentence under the Three Strikes law (§§ 1170.12, §667, subd. (b)–(i))¹¹ and section 667, subdivision (a)(1).¹²

conviction was a serious felony for purposes of the Three Strikes Law, the same conclusion would apply to the five-year serious-felony enhancement."

Accordingly, we consider whether there is substantial evidence in the record to support the trial court's true findings that he committed two prior serious felony offenses based upon two convictions for violations of former section 245, subdivision (a)(1) for purposes of both the Three Strikes law (§§ 667, subd. (b)–(i), 1170.12) and the five-year serious felony enhancement statute (§ 667, subd. (a)(1)).

¹¹ Section 1170.12, subdivision (c)(2)(A) provides in relevant part:

Section 1192.7, subdivision (c) provides that a " 'serious felony' " includes the offense of "assault with a deadly weapon" (§ 1192.7, subd. (c)(31).)

b. *Former section 245, subdivision (a)(1)*

Former section 245, subdivision (a)(1) (Stats. 1993, ch. 369, § 1) provided in relevant part:

"Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished"

Thus, as the People acknowledge, a conviction under the deadly weapon prong of former section 245, subdivision (a)(1) is a serious felony, but a conviction under the great

"[I]f a defendant has two or more prior serious . . . felony convictions, as defined in subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greatest of:

"(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior serious . . . felony convictions"

Section 1170.12, subdivision (b)(1) defines a serious felony as including "[a]ny offense defined in subdivision (c) of . . . Section 1192.7 as a serious felony in this state."

12 Section 667, subdivision (a)(1) provides in relevant part that "[a]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

Section 667, subdivision (a)(4) provides, "As used in this subdivision, 'serious felony' means a serious felony listed in subdivision (c) of Section 1192.7."

bodily injury prong of the statute is not. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065 (*Delgado*).)

c. *The law governing the determination of whether a prior conviction constitutes a serious felony*

i. *Delgado and Miles*

In *Delgado*, the California Supreme Court outlined the People's burden in establishing the truth of a sentence enhancement allegation:

"The People must prove each element of an alleged sentence enhancement beyond reasonable doubt. [Citation.] Where, as here, the mere fact that a prior conviction occurred under a specified statute does not prove the serious felony allegation, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue." (*Delgado, supra*, 43 Cal.4th at p. 1065.)

The *Delgado* court also described a common means by which the People may carry their burden of proving the fact and nature of a prior conviction:

"A common means of proving the fact and nature of a prior conviction is to introduce certified documents from the record of the prior court proceeding and commitment to prison, including the abstract of judgment describing the prior offense. [Citations.]

" '[The] trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction' [Citations.] '[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold requirements of admissibility.' " (*Delgado, supra*, 43 Cal.4th at p. 1066.)

The *Delgado* court also concluded that a "contemporaneous, officially prepared abstract of judgment that clearly describes the nature of the prior conviction should . . . in the absence of rebuttal evidence, be presumed reliable and accurate." (*Delgado, supra*, 43

Cal.4th at pp. 1070–1071; accord *Miles, supra*, 43 Cal.4th at p. 1083 ["Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record and describing the prior conviction, is truthful and accurate"].)¹³

However, in *Miles*, which was decided on the same day as *Delgado*, the Supreme Court made clear that where "[t]here [is] no evidence [a document] ha[s] been prepared contemporaneously with the judgment by a court official charged with the duty of recording it accurately," the document is "*not* reliable evidence of the nature of the conviction." (*Miles, supra*, 43 Cal.4th at p. 1093, italics added [stating that it agreed with the Court of Appeal's conclusion in *People v. Jones* (1999) 75 Cal.App.4th 616 that a defendant's fingerprint card was not reliable evidence of the nature of his conviction].)

ii. *People v. Gallardo*

In *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), the California Supreme Court revisited the scope of permissible "judicial factfinding" when a trial court determines the nature or basis of a prior conviction. (*Id.* at p. 136.) The *Gallardo* court concluded:

"The judicial factfinding permitted under the [*Almendarez-Torres v. United States* (1998) 523 U.S. 224] exception [to a defendant's Sixth Amendment right to a jury trial¹⁴] does not extend 'beyond the

¹³ In *Delgado*, "[t]he official abstract of judgment for defendant's prior conviction first identif[ie]d the statute under which the conviction occurred as 'PC' '245(A)(1),' then separately describe[d] the offense as 'Asslt w DWpn.' " (*Delgado, supra*, 43 Cal.4th at p. 1069.) The *Delgado* court concluded that such an abstract of judgment constituted substantial evidence that the defendant had been convicted under the deadly weapon prong of former section 245, subdivision (a)(1). (*Delgado, supra*, at pp. 1069–1070.)

¹⁴ The *Gallardo* court explained the nature of this exception as follows:

recognition of a prior conviction.' [Citation.] Consistent with this principle, and with the benefit of further explication by the high court, we now hold that a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction. [Citation.] That inquiry invades the jury's province by permitting the court to make disputed findings about 'what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.' [Citation.] The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Id.* at p. 136.)

Applying this understanding of the law, the *Gallardo* court concluded that "[b]y relying on the preliminary hearing transcript to determine the 'nature or basis' of defendant's prior conviction, the sentencing court engaged in an impermissible inquiry to determine ' "what the defendant and state judge must have understood as the factual basis of the prior plea." ' " (*Gallardo, supra*, 4 Cal.5th at p. 137.) The *Gallardo* court explained that "[b]ecause the relevant facts were neither found by a jury nor admitted by defendant

"In [*Apprendi v. New Jersey* (2000) 530 U.S. 466] the United States Supreme Court held that the Sixth Amendment right to jury trial extends to those disputed facts that may not be formally designated as 'elements' of the offense, but nevertheless expose the defendant to additional punishment. [Citation.] The court, however, recognized a 'limited exception' for the ' "fact" of prior conviction.' (*Id.* at p. 488 & fn. 14, citing [*Almendarez-Torres v. United States, supra*, 523 U.S. 224].)" (*Gallardo, supra*, 4 Cal.5th at p. 128.)

when entering her guilty plea, they could not serve as the basis for defendant's increased sentence here." (*Ibid.*)¹⁵

In determining the appropriate remedy for such error, the *Gallardo* court stated, "We . . . agree with the parties that the appropriate course is to remand to permit the trial court to make the relevant determinations about what facts defendant admitted in entering her plea." (*Gallardo, supra*, 4 Cal.5th at p. 138.) Accordingly, the *Gallardo* court remanded the matter "to permit the People to demonstrate to the trial court, based on the record of the prior plea proceedings, that defendant's guilty plea encompassed a relevant admission about the nature of her crime." (*Id.* at p. 139.)

3. *Factual and procedural background*

After the jury returned its verdicts on the substantive offenses, the trial court held a court trial on the prior conviction allegations. At the trial, the trial court admitted in evidence four exhibits that the People offered to prove that Taylor had suffered two prior serious felony convictions.

Exhibit 1Z, consists of three pages of a California Law Enforcement Telecommunications System (CLETS) report prepared by the San Bernardino County District Attorney.¹⁶ The report references a 1995 case with case number FSB06393 with

¹⁵ In so concluding, the *Gallardo* court disapproved *People v. McGee* (2006) 38 Cal.4th 682, insofar as *McGee* suggested that the such factfinding was constitutionally permissible. (*Gallardo, supra*, 4 Cal.5th at p. 125.)

¹⁶ Such reports are colloquially known as criminal "rap sheets." (*People v. Morris* (2008) 166 Cal.App.4th 363, 367.)

convictions for two counts of "245(A)(1) PC-FORCE/ADW NOT FIREARM: GBI
LIKELY."

Exhibit 2Z is a fingerprint card bearing Taylor's fingerprints obtained in June 2017.

Exhibit 3Z is a series of certified documents provided by the Department of Corrections and Rehabilitation. The cover letter states, "The Abstract of Judgment for case FSB06393 is unavailable; therefore, we have provided the Court Commitment and Sentence Component printouts."

The "Court Commitment" printout document includes a spreadsheet under a heading entitled, "Related Sentence Components." The spreadsheet contains various field identifiers including "Case #," "Crime (Statute)," and "Offense." In two of the rows, under these identifiers, are the words, "FSB06393," "PC245(a)(1) [01]," and "Assault with a Deadly Weapon."

There are two "Sentence Component" documents within Exhibit 3Z that each contain a series of fields. One of the fields states, "Statute Code: PC245(a)(1)[01]-Assault with a Deadly Weapon." Another field states, "Type of Weapon: None." A third field states, "Offense Type: Serious Felony."

Exhibit 3Z also contains a fingerprint card bearing Taylor's name. One of the fields on the card is entitled "Offense," and states:

"FSB06393 CT2 PC245(A)(1) ASLT W/DEAD WEPON 4YRS,
"CT3 PC245(A)(1) ASLT W/DEAD WEPON 4YRS"

Exhibit 5Z includes a series of charging documents provided by the San Bernardino County District Attorney related to the prior convictions. Included in those documents is

an amended information for case No. FSB06393 in which the People charged Taylor with attempted premeditated murder (§§ 664, 187, subd. (a)) (count 1). With respect to count 1, the People also alleged that Taylor personally used a firearm and personally inflicted great bodily upon the victim, thereby causing the offense to be a serious felony within the meaning of section 1192.7, subdivision (c)(8). The amended information also charged Taylor with two counts of assault with a semiautomatic firearm (§ 245, subd. (b)) (counts 2 and 3). Counts 2 and 3 each pertained to a different victim and alleged that Taylor used a firearm within the meaning of section 12022.5 during each charged assault. Counts 2 and 3 also alleged that Taylor personally used a firearm, thereby causing the offense to be a serious felony within the meaning of section 1192.7, subdivision (c)(8).

Exhibit 5Z also includes a plea agreement form for case No. FSB06393. The agreement indicates that the People charged Taylor with attempted murder and two counts of assault with a semiautomatic firearm, and that the People alleged firearm and great bodily injury enhancement allegations.

The agreement states in typewritten font:

"I desire to change my plea(s) and plead guilty/nolo contendere (no contest) to:
(Set forth count and code section(s) including lesser offense(s) to which plea [is] to be made):"

The words "no contest" are underlined.

Underneath this statement, the following is handwritten:

"P.C. 245 (a)(1) 2 counts"

Directly below this admission, the form states in typewritten font:

"I understand that the maximum punishments I could receive for each crime are:

"COUNT NUMBER NAME OF CRIME
MAXIMUM PRISON/JAIL COMMITMENTS"

Under these three headings, the following are handwritten:

"2 cts Assault w/deadly Weapon
2-3-4 yrs St. Prison"

The form contains a box next to this maximum punishment information captioned "INITIAL AFTER READING." There are no initials in that box.

The form also indicates that Taylor entered into the agreement because the Court had agreed to sentence him to four years in state prison and the People had agreed to dismiss the firearm and great bodily injury enhancements in the case and to dismiss another case in which Taylor had been charged with being a felon in possession of a firearm.

Taylor signed the form.

4. *Application*

We assume for purposes of this decision that *Delgado* and *Miles* remain good law, and that a court may rely on an abstract of judgment or other "official government document, prepared contemporaneously as part of the judgment record and describing the prior conviction," (*Miles, supra*, 43 Cal.4th at p. 1083) in determining the nature of a prior conviction. (But see *People v. Hudson* (2018) 28 Cal.App.5th 196, 210 [discussing *Gallardo* and *Delgado* and stating, "While the abstract of judgment may be entitled to presumptions of reliability under state law, whether or not the evidence contained therein

violates [defendant's] Sixth Amendment right to a jury trial based on impermissible judicial factfinding is a separate and distinct inquiry"].)

However, it is undisputed that the People did *not* introduce the judgment or the abstract of judgment in evidence in this case. While the People did present certified documents from the Department of Corrections and Rehabilitation entitled "Court Commitment" and "Sentence Component," there is nothing in the record indicating that these documents were "prepared contemporaneously as part of the judgment record and describing the prior conviction." (*Miles, supra*, 43 Cal.4th at p.1083.) Indeed, as Taylor argues, there is no evidence in the record as to "how, when, or by whom those commitment documents were created." Absent such evidence, the prison documents that the People offered in this case are insufficient under *Miles* and *Delgado* to establish the nature of Taylor's prior convictions.¹⁷

Notwithstanding the absence of an abstract of judgment describing Taylor's prior convictions, the People argue that the "evidence here is even stronger than it was in *Delgado*." In support of this argument, the People cite to the plea form and note that one portion of the form states, "Assault w/ deadly [w]eapon." These words, however, appear

¹⁷ As noted above (see pt. III.C.3, *ante*), one field in the Sentence Component documents states, "Type of Weapon: None." While such a notation might be said to be consistent with a finding that *no* weapon was used in the commission of the prior offenses, the field could also indicate the lack of evidence as to the *type* of weapon used. The parties do not address the significance or meaning of this field in their briefs, and we do not rely on it in our analysis. Rather, for the reasons stated in the text above, we conclude that the Court Commitment and Sentence Component documents do not constitute substantial evidence that Taylor suffered two convictions for assault with a deadly weapon since they were not "prepared contemporaneously as part of the judgment record" for the purpose of "describing the prior conviction." (*Miles, supra*, 43 Cal.4th at p.1083.)

under a heading entitled, "I understand that the maximum punishments I could receive for each crime are." While a similar notation on an *abstract of judgment* may be sufficient to establish the nature of a defendant's conviction (*Delgado, supra*, 43 Cal.4th at pp. 1069–1070), that is because an abstract of judgment is a "statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence." (*Id.* at p. 1070.) The notation in this case, in contrast, is imbued with none of these characteristics. Further, when read in context, the words "Assault w/ deadly [w]eapon," merely describe the generic title of the offense as to which Taylor agreed to be punished.

With respect to the critical issue of the precise crime to which Taylor pled no contest, the plea form states simply that Taylor agreed to plead no contest to "P.C. 245 (a)(1) 2 counts." No other portion of the plea agreement form provides either a factual description or notation as to the form of assault to which Taylor was pleading no contest. Nor does the record contain *any* evidence from the plea hearing. In short, there is nothing in "the record of the prior plea proceedings," that establishes that the "defendant's [no contest] plea encompassed a relevant admission about the nature of [his] crime," sufficient to support the trial court's serious felony true findings. (*Gallardo, supra*, 4 Cal.5th at p. 139.)

We are not persuaded by the People's argument that we may infer from the fact that Taylor was "originally charged," with offenses and enhancements involving firearms that constituted serious felonies that his *convictions* were for assault with a deadly weapon. Taylor did not plead no contest or guilty to *any* of the offenses alleged in the amended

information, nor did he admit any of the allegations contained in that information. Thus, we may not rely on the amended information in determining the nature of his *convictions*.

Finally, none of the other evidence in the record constitutes substantial evidence of the nature of Taylor's prior convictions. The CLETS printouts are not part of the record of conviction and thus cannot be used to prove "the nature and circumstances of the conduct underlying a prior conviction." (*People v. Martinez* (2000) 22 Cal.4th 106, 116; *Delgado, supra*, 43 Cal.4th at p. 1065 [describing "record of . . . conviction" limitation in proving the nature of a prior conviction].) The fingerprint card offered in Exhibit 2Z containing Taylor's fingerprints from 2017, does not have any relevance in determining the nature of the prior convictions. The fingerprint card bearing Taylor's name in Exhibit 3Z that describes, in abbreviated form, Taylor's prior offenses does not constitute sufficient evidence of the nature of those offenses under *Miles*. (See *Miles, supra*, 43 Cal.4th at p. 1093 [explaining agreement with case law stating that fingerprint card did not constitute reliable evidence of nature of defendant's prior conviction].)

For these reasons, we conclude that there is not substantial evidence in the record that Taylor suffered prior convictions for assault with a deadly weapon such that these convictions constituted serious felonies under California law. Accordingly, we further conclude that there is not substantial evidence in the record to support the trial court's true findings on the strike and serious felony enhancement allegations.

Taylor acknowledges that a retrial of the prior conviction allegations is not barred by principles of double jeopardy. However, he contends that a remand for retrial is unnecessary because it is clear that the People will be unable to provide additional

evidence to prove such allegations on remand. We disagree. The record does not unequivocally demonstrate that the People will be to unable to carry their evidentiary burden of proving the prior conviction allegations.¹⁸

Accordingly, we remand the matter to the trial court with directions to permit the People to retry the prior serious felony conviction allegations, should they so choose.¹⁹

D. *At resentencing, the trial court shall exercise its discretion in determining whether to strike the section 12022.53, subdivision (d) firearm enhancement*

Taylor claims that the matter should be remanded to the trial court to permit the court to consider whether to exercise its discretion to strike the section 12022.53, subdivision (d) firearm enhancement, in accordance with a change in the law. (See Stats. 2017, ch. 682, § 2 [enacting section 12022.53, subdivision (h)].)

After the conclusion of any retrial of the prior serious felony conviction allegations, the trial court will have to resentence Taylor. At resentencing, the court is directed to consider whether to strike the section 12022.53, subdivision (d) firearm enhancement in

¹⁸ In addition, notwithstanding that it imposed only a *single* five-year serious felony enhancement (§ 667, subd. (a)(1)), it appears that the trial court found true *two* serious felony enhancement allegations. Although not addressed by the parties in this appeal, we note that, "[I]t is an element of the prior serious felony enhancement that the charges be 'brought and tried separately' and where, as in this case, multiple serious felonies were proven in a single prior proceeding, the People cannot prove more than one such enhancement exists." (*People v. Jones* (2015) 236 Cal.App.4th 1411, 1415–1416, italics omitted.) The parties and the trial court shall consider this issue upon any retrial of the prior conviction allegations.

¹⁹ In light of our reversal, we need not consider Taylor's argument that the trial court's comments in the record concerning the evidence offered to prove the prior conviction allegations demonstrates that the court abused its discretion in evaluating such evidence.

accordance with this change in the law. (See § 12022.53, subd. (h) ["The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law"].)²⁰

E. *Any serious felony enhancement (§ 667, subd. (a)(1)) imposed on remand shall be ordered to run consecutive to the terms on the substantive offenses*

The People claim that the trial court erred in imposing the five-year serious felony enhancement (§ 667, subd. (a)(1)) to run concurrently with the indeterminate term.²¹

Although we need not consider this contention in light of our reversal of the serious felony enhancement (§ 667, subd. (a)(1)), the trial court is directed to order any serious felony enhancement (§ 667, subd. (a)(1)) imposed on remand to run consecutive to any terms on the substantive offenses. (See § 667, subd. (a)(1) ["The terms of the present offense and each enhancement shall run consecutively"]; *People v. Myers* (1993) 5 Cal.4th

²⁰ In his opening brief, Taylor argued that the change in the law applied retroactively and that the matter should be remanded for resentencing irrespective of any other reversal of the judgment. The People concede that the change in the law applies retroactively but argue that a remand is unnecessary because it is clear that the trial court would not exercise its direction to strike the firearm enhancement. In light of our reversal of the judgment on other grounds, these arguments are now moot because the trial court will have to resentence Taylor after the effective date of the change in the law.

²¹ In his reply brief, Taylor states, "Respondent's analysis appears correct."

1193, 1195, fn. 1 [stating that section 667 provides "additional five-year term, *consecutive* to the term for the new offense" (italics added)].²²

F. *The trial court shall ensure that the abstract of judgment prepared upon resentencing does not contain two errors that are contained in the original abstract of judgment*

Taylor claims that the abstract of judgment incorrectly lists his sentence as "life with the possibility of parole," (capitalization omitted) on line 5, and incorrectly lists a sentence of "25 years to Life on count[] 1," on line 6b. The People concede the errors. When preparing a new abstract of judgment on remand, the trial court shall ensure that these errors are not repeated.

IV.

DISPOSITION

The judgment is reversed with respect to the trial court's true findings on the strike and serious felony enhancement allegations. The matter is remanded to the trial court for the limited purpose of retrying the prior strike and serious felony conviction allegations, in accordance with part III.C, *ante*, and, thereafter, resentencing Taylor in accordance with part III.D and part III.E, *ante*. Following resentencing, the trial court shall prepare a new

²² In a supplemental brief, Taylor claims that we should remand the matter to permit the trial court to consider whether to strike the five-year serious felony enhancement (§ 667, subd. (a)(1)) in accordance with a change in the law, effective January 1, 2019. (See Stats. 2018, ch. 1013, §§ 1–2.) We need not consider this contention in light of our reversal of the serious felony enhancement (§ 667, subd. (a)(1)). However, on remand, at resentencing, the court is directed to consider whether to strike the punishment for any serious felony enhancement allegation (§ 667, subd. (a)(1)) found to be true, in accordance with this change in the law.

abstract of judgment in a manner consistent with part III.F, *ante*, and forward a certified copy of the abstract to the Department of Corrections and Rehabilitation.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.